Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ABEL OBABUEKI,

Petitioner,

v.

CHOICEPOINT, INC. and CHOICEPOINT SERVICES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, ("FCRA" or "the Act"), imposes limitations on the information that a credit reporting agency may report about consumers. Among these, where it reports public-record information to potential employers, it must use procedures that ensure such information will have the maximum possible accuracy and be complete and up to date. *Id.* §§ 1681e(b), 1681k(a). A credit reporting agency's failure to follow these requirements makes it liable to the consumer for "actual damages sustained by the consumer as a result of" the wrongful conduct. *Id.* § 1681*o*(a). The questions presented by this petition are:

1. Whether causation of damages sustained as a "result of" the lack of procedures for ensuring maximum accuracy and completeness of a credit report is a question for the jury where there are potentially mixed motives for the adverse action taken by the recipient of a report prepared without such procedures?

2. Whether the absence of damages from loss of employment precludes mental distress damages sustained as a result of an inaccurate or incomplete report itself or punitive damages based on a willful violation of the FCRA?

3. Whether a report to an employer is "accurate" when it reports misleading adverse information about a potential employee that was not requested by the employer and that was specifically excluded from the information sought by the employer?

PARTIES TO THE PROCEEDINGS BELOW

Appellant in the court of appeals was Abel Obabueki, who was also the plaintiff in the district court.

Appellees in the court of appeals were respondents Choicepoint, Inc. and Choicepoint Services, Inc., who were also defendants in the District Court. IBM, Inc., was also an appellee in the court of appeals and a defendant in the district court but is not named as a respondent in this petition. Choicepoint Business and Government Services, Inc., was a defendant in the district court but was dismissed on consent of the parties.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT 10

I. Whether Causation of Damages Should Be Decided by a Jury Is an Important National Question Subject to Conflicting Approaches in the Federal Circuits 11

II. Overriding the Jury's Determination of Causation Disregarded this Court's Holding in *Reeves* v. *Sanderson Products*. 17

III. The Decision Below Erred In Holding that Damages for Mental Distress and Punitive Damages Are Dependent on Causation for Economic Damages, Contrary to the Holdings in Other Circuits 20

A. Damages for Mental Distress. 20

B. Punitive Damages. 21

IV. The Legal Standard for Whether a Report Has the "Maximum Possible Accuracy" Is an Important National Question on Which the Circuits are Divided. 22

V. This Case Raises Important and Recurring National Issues that Should Be Resolved by this Court. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Pages

Cases

Bakker v. *McKinnon*, 152 F.3d 1007 (CA8 1998).....21, 22

Bryant v. *TRW*, 689 F.2d 72 (CA6 1982).....24

Cassara v. *DAC Services, Inc.*, 276 F.3d 1210 (CA10 2002).....26

Cousin v. *Trans Union Corp.*, 246 F.3d 359 (CA5), *cert. denied*, 534 U.S. 951 (2001).....21

Cushman v. *Trans Union Corp.*, 115 F.3d 220 (CA3 1997).....21

Dalton v. *Capital Associated Industries, Inc.*, 257 F.3d 409 (CA4 2001).....21

Desert Palace, Inc. v. *Costa*, -- U.S. --, 123 S. Ct. 2148 (2003).....16

Doe v. *Webster*, 606 F.2d 1226 (CADC 1979).....8, 25

Guimond v. *Trans Union Credit Information Co.*, 45 F.3d 1329 (CA9 1995).....20, 21

Millstone v. *O'Hanlon Reports, Inc.*, 528 F.2d 829 (CA8 1976).....22

Mt. Healthy City School Dist. Bd. of Educe. v. *Doyle*, 429 U.S. 274 (1977).....15

Old Chief v. *United States*, 519 U.S. 172 (1997).....18

Philbin v. *Trans Union Corp.*, 101 F.3d 957 (CA3 1996).....14, 21

Pinner v. *Schmidt*, 805 F.2d 1258 (CA5 1986), *cert. denied*, 483 U.S. 1022 (1987).....22

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989).....15

Reeves v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).....19

Stevenson v. *TRW*, 987 F.2d 288 (CA5 1993) 20

Stewart v. *Credit Bureau, Inc.*, 734 F.2d 47 (CADC 1984) 15, 24, 26

Thornton v. *Equifax, Inc.*, 619 F.2d 700 (CA8), *cert. denied*, 449 U.S. 835 (1980) 22

United States v. *Doe*, 36 F. Supp.2d 143 (S.D.N.Y. 1999) 26

Yohay v. *City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967 (CA4 1987) 22

Zamora v. *Valley Fed. Savs. & Loan Ass'n*, 811 F.2d 1368 (CA10 1987) 21

Statutes

15 U.S.C. § 1681 ..... i, 2

15 U.S.C. § 1681b 3, 6, 7, 14

15 U.S.C. § 1681e ..... i, 2, 7, 11

15 U.S.C. § 1681k ..... i, 2, 7

15 U.S.C. § 1681n 21

15 U.S.C. § 1681*o* ..... i, 3, 11, 18

18 U.S.C. § 5005 ..... 8, 25

18 U.S.C. § 5021 (repealed 1984) 8, 25

28 U.S.C. § 1254(1) 2

Other Authorities

H.R. Rep. No. 16340, 91st Cong., 2d Sess. (1970) 16

S. Rep. No. 823, 91st Cong., 1st Sess. (1970) 15, 28

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's opinion and order addressing various cross-motions for summary judgment is reported at 145 F. Supp.2d 371 and is reproduced herein as Appendix B (pages B1-B52). The district court's post-trial opinion and order granting defendants judgment as a matter of law is reported at 236 F. Supp.2d 278 (S.D.N.Y. 2002) and is reproduced herein as Appendix C (pages C1-C12). The Second Circuit's opinion, as amended, affirming and adopting the reasoning of the district court's prior opinion is published at 319 F.3d 87, and is reproduced herein as Appendix A (pages

A1-A2). The Second Circuit's order denying rehearing and rehearing *en banc* is unpublished, and is reproduced herein as Appendix D (pages D1-D2).

JURISDICTION

The Second Circuit issued its it initial opinion on February 3, 2003, amended that opinion on February 24, 2003, and denied rehearing and rehearing *en banc* on April 29, 2003. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Fair Credit Reporting Act (FCRA), codified at 15 U.S.C. § 1681 *et. seq.*

Section 607(b) of the FCRA, codified at 15 U.S.C. § 1681e(b), provides:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Section 613(a) of the FCRA, codified at 15 U.S.C. § 1681k(a), provides:

> A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall –
>
> (1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting

agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

Section 616a(a) of the FCRA, codified at 15 U.S.C. § 1681*o*(a), provides:

Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Section 604(b)(1) of the FCRA, codified at 15 U.S.C. § 1681b(b)(1), provides, in relevant part:

A consumer reporting agency may furnish a consumer report for employment purposes only if –

(A) the person who obtains such report from the agency certifies to the agency that –

> (i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and
>
> (ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation[.]

STATEMENT OF THE CASE[1]

1. This case involves the standards for determining liability and damages for an inaccurate credit report prepared in violation of FCRA procedures designed to ensure that such reports are accurate, complete, and current. After a trial, the jury below returned a verdict awarding petitioner $450,000 in damages sustained as a result of an inaccurate credit report issued to a prospective employer that caused petitioner significant emotional distress and the loss of a job offer. On post-trial motions, however, the district court vacated the verdict and dismissed the complaint by holding that the inaccurate report had been "neutralized" by subsequent information provided by petitioner, and thus supposedly could not have caused the petitioner's loss of the job offer. That conclusion is both wrong and in conflict with decisions from several circuits.

2. On September 27, 1999 petitioner Abel Obabueki was offered an $85,000-a-year marketing position at IBM. The offer was subject to a pre-employment screening process that included a questionnaire instructing petitioner to reveal criminal convictions, but to omit "arrests without convictions

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[1] Unless otherwise noted, the facts are taken from the opinions below, attached as Appendices A-C.

[and] convictions or incarcerations for which a record has been sealed or expunged." App. C3. Although petitioner had been arrested and pled *nolo contendere* to a misdemeanor some years earlier, pursuant to his plea agreement that initial plea was withdrawn following a successful period of probation, the charges were dismissed, and his record was cleared. Accordingly, he correctly responded to the questionnaire that he had no convictions.

That response was not only correct as a matter of the plea agreement, whereby his record was cleared, but it was also the correct answer according to IBM's internal understanding of its questionnaire. An IBM human resources director testified that where a job applicant like plaintiff has a deferred adjudication, after a period of probation, the court "more or less seals the records or voids the record so there is no record. * * *. If [the defendant] complete[s] [the period of probation] satisfactorily * * * the person should not have to claim" a conviction on the background check. Second Circuit Joint Appendix (JA) 1347.

To verify petitioner's screening information, IBM hired respondent Choicepoint[2] to conduct a background search. The agreement between IBM and Choicepoint required Choicepoint to report only current and pending criminal charges and, per Choicepoint's internal rules, forbade the transmission of deferred adjudications. JA 767 (Choicepoint's internal regulations); JA 808 (IBM's contract with Choicepoint).

On October 5, 1999, Choicepoint incorrectly reported to IBM that petitioner had a conviction. There is no dispute in this case that Choicepoint failed to follow adequate procedures to verify the information it obtained and reported, that it failed to determine that the conviction had been vacated, and

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[2] Respondents Choicepoint, Inc. and Choicepoint Services, Inc. were held by the district court to be alter-egos and hereinafter will be referred to together as "Choicepoint."

that, had it followed its legal obligations and its agreement with IBM, it would have accurately reported that petitioner had no convictions.[3]

Following IBM's receipt of Choicepoint's inaccurate report, IBM informed petitioner Obabueki of the discrepancy between his answer and the report. Petitioner attempted to convince IBM that he had accurately answered the questionnaire, and sent IBM a copy of the court order vacating his previous plea and dismissing the charge against him. The order, however, only confused IBM, App. B21-B23, B25, and thus IBM chose to believe Choicepoint's erroneous report, concluded that petitioner had lied, and, on October 14, 1999, withdrew the job offer. App. C4.

On October 21, 1999, Choicepoint acknowledged its error and issued a revised report that correctly stated that petitioner's criminal record was "clear"; it failed, however, to explain the basis for its inconsistent reports. App. C5.

Notwithstanding the revised report, IBM did not re-offer petitioner the job and gave petitioner no alternative reason for its refusal to reinstate the earlier offer. Internally, however, IBM looked for ways to cover up its reliance on the initial incorrect report. *See, e.g.*, JA 844 ("[W]e should also probably pitch the incorrect information from Choicepoint (as if we never received it)[.]"); JA 859 (decision maker at IBM asking internally, in response to an e-mail query from petitioner, whether she should "a) ignore this[;] b) tell him it is out of my hands * * * [;] c) tell him that the vacancy no longer exists * * * [;] d) all of the above[;] e) something else??").

3. Having reached a dead-end with IBM, petitioner sued both IBM and Choicepoint for violations of the Fair Credit Reporting Act and asserted several pendant state claims.

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[3] There also is no dispute that Choicepoint had not obtained a required certification of use from IBM, 15 U.S.C. § 1681b(b)(1), and hence should not have sent the report to IBM at all. App. B41.

On cross-motions for summary judgment, the district court, *inter alia*, dismissed IBM from the case, permitted the FCRA and other claims against Choicepoint to proceed to trial. The court held that Choicepoint had violated 15 U.S.C. § 1681b(b)(1)(A) by providing a consumer report to IBM without obtaining required certifications from IBM, App. B41, had provided a report that was "neither complete nor up to date" under 15 U.S.C. § 1681k, App. B42-B43, and had provided a report that "was not maximally accurate" under 15 U.S.C. § 1681e(b), App. B47. The case then proceeded to trial against Choicepoint.

At trial, the evidence included testimony and documents concerning Choicepoint's lack of procedures designed to ensure the accuracy of its reports, the economic injury sustained by plaintiff as a result of the loss of the IBM job, as well as the mental distress that he suffered. On the issue of causation, the district court, without objection, permitted petitioner to introduce Choicepoint's responses to discovery requests for admissions, including the express admission that "[a]s a result of the information provided by Choicepoint, IBM withdrew [plaintiff's] job offer." App. C9. Part way through the trial the district court struck out petitioner's claim for punitive damages, leaving only claims for lost wages and for mental distress.

The jury returned a verdict for petitioner and awarded him $450,000 for lost wages and mental distress. App. C2. The jury reached that result through a special verdict form in which it: (1) found that Choicepoint had not maintained strict procedures designed to ensure that information reported about consumers was complete and up to date; and (2) found that Choicepoint had not maintained reasonable procedures designed to assure maximum accuracy concerning information about consumers; and (3) answered "Yes" to the question "Do you find as a result of one or more of Choicepoint's violation of the Fair Credit Reporting Act that plaintiff sustained damages?" JA 1476-77, JA 1479-80.

Notwithstanding that jury verdict, the district court granted Choicepoint's subsequent motion for judgment as a matter of law and dismissed the case in its entirety.

It reached that conclusion by accepting Choicepoint's claim that petitioner himself had "cured" the inaccuracy of the initial report by sending IBM a copy of the order vacating his conviction and by holding that "the inaccuracy was effectively neutralized on October 5, 1999, when plaintiff faxed a copy of the 1997 dismissal order provided by plaintiff." App. C10; *id.* ("IBM based its decision on information that was complete and accurate."). The court rejected petitioner's claim that he was entitled to a "clean" report from Choicepoint and that any additional information could not have cured Choicepoint's failures. App. C6-C7. The district court likewise rejected the position of the D.C. Circuit in a related context that vacated convictions should not be reported at all. App. C7-C8; *see Doe* v. *Webster*, 606 F.2d 1226, 1239-40 (CADC 1979) (a vacated conviction obtained upon satisfaction of a plea agreement entitles an individual to deny the existence of the former conviction and forbids the court to report the conviction).[4] Indeed, despite the facts that under both Choicepoint's internal policies and the IBM-Choicepoint agreement petitioner should have received a clean report with no mention of his vacated plea, the district court substituted its own judgment and determined that petitioner was not entitled to a clean report because such a report would amount to "judicially mandated prevarication." App. C8.[5]

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[4] *Doe* v. *Webster* involved the since-repealed Youth Corrections Act, 18 U.S.C. §§ 5005, 5021 (repealed 1984).

[5] While recognizing that under the law governing petitioner's vacated conviction any "requirement that a vacated conviction be disclosed in any questionnaire appears to contradict the statute's purpose in relieving an ex-offender of penalties and disabilities associated with the conviction," App. B20, the court substituted its own view that it would be better not to hold the reporting agency responsible for interpreting state laws. Rather,

Having concluded that "the inaccuracy of the initial report lay in its omission of the 1997 dismissal order, not in its failure to report that plaintiff had no convictions whatsoever," App. C10, the court further found that IBM based its decision to withdraw the job offer on "both the initial Choicepoint report and the 1997 order" vacating petitioner's conviction and that the fact that the withdrawal of the offer "was based upon IBM's possibly erroneous interpretation of the legal effect of the 1997 order is of no consequence to the issue of whether Choicepoint caused plaintiff's injury." App. C10.[6]

The court discounted the relevance of Choicepoint's subsequent issuance of a "clear" report on reinvestigation by claiming that such a report did "not mean that the information relied on by IBM in reaching its conclusion was incomplete or inaccurate," or that the "withdrawal of plaintiff's job offer was caused by Choicepoint's provision of incorrect information." App. C10-C11 n. 4. The court also rejected petitioner's contention that Choicepoint's admission – that "[a]s a result of the information provided by Choicepoint, IBM withdrew [plaintiff's] job offer" – was alone enough for the jury to find proximate cause. App. C9-C10.

The court thus granted Choicepoint's motion for judgment as a matter of law and dismissed the complaint. Apparently recognizing the tenuousness of that conclusion, the court ruled in the alternative that if its "judgment is subsequently vacated or reversed on appeal, Choicepoint's motion in the alternative for a new trial is conditionally granted pursuant to Rules 50(c)(1) and 59." App. C12. The court offered no explanation for why a new trial would be appropriate.

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the court viewed that task as better performed by potentially inexperienced human resources personnel.

[6] The court similarly found no causal connection between petitioner's damages and Choicepoint's sending IBM its erroneous report despite not having obtained a required certification from IBM regarding its intended use of the report. App. C11.

Petitioner appealed to the Second Circuit, and the Second Circuit affirmed for the reasons stated by the district court. App. A2. The Second Circuit also held that it "need not consider" the issue of punitive damages in the absence of causation for economic damages. *Id.*

Petitioner sought rehearing and rehearing *en banc*, both of which were denied. App. D1.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decisions below distort the standard of proof for causation of damages "sustained as a result of the failure" to "comply with any requirement imposed under" the FCRA, in conflict with decisions from other circuit courts of appeal and from this Court. The decisions below also erroneously tied liability for emotional distress and punitive damages to causation of economic injury rather than to the issuance of the erroneous report itself, contrary to the holdings in other circuits. Finally the decisions below apply an incorrect legal definition of what constitutes "maximum possible accuracy" for a report under the FCRA, in conflict with the interpretations of that concept by the Sixth and D.C. Circuits.

The issues of accuracy and causation are present in virtually every FCRA case given that the victims of erroneous or incomplete credit reporting typically will attempt to mitigate any inaccuracies or omissions with accurate information once the error is revealed. But if such attempts at mitigation are deemed to render a credit report accurate in combination with the victim-supplied information and such combined information is deemed to break the causal chain for all categories of damages, few claimants would be able to establish causation and it would create a Catch-22 situation whereby unlawful credit practices would be immunized from liability either by a plaintiff's failure to mitigate or by a break of causation.

The correct approach is to leave causation to a jury. Because inaccurate adverse information results in injury by its mere reporting and further creates a momentum of its own that may continue to tilt the scales against a consumer even after the report is corrected, the issue of causation should always be a question of fact for the jury whenever an inaccurate report is issued to an employer. The Second Circuit's failure to recognize that false reports can result in harms regardless of whether the report is subsequently corrected effectively guts the FCRA.

I. WHETHER CAUSATION OF DAMAGES SHOULD BE DECIDED BY A JURY IS AN IMPORTANT NATIONAL QUESTION SUBJECT TO CONFLICTING APPROACHES IN THE FEDERAL CIRCUITS.

The FCRA requires that an agency preparing a consumer report "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e. The statute further provides that a consumer may recover from a person negligently "failing to comply with any requirement imposed under" the FCRA "any actual damages sustained by the consumer as a result of the failure." U.S.C. § 1681o(a)(1).

In this case there is no dispute that Choicepoint failed to follow reasonable procedures and that such failure caused Choicepoint to issue an inaccurate report to IBM. App. C10. There also is no dispute that if Choicepoint *had* in fact followed reasonable procedures, it would *not* have reported any conviction whatsoever, but would have, as a matter of its own agreement with IBM, reported that petitioner's record was

clear. Indeed, upon reinvestigation of its report, Choicepoint issued a new report that correctly listed his record as clear.[7]

Despite the fact that compliance with the terms of the FCRA would have nipped the entire chain of events in the bud and would have resulted in petitioner receiving his job, the district court determined that because IBM ultimately received supplemental information regarding the order vacating the conviction, the inaccuracy of Choicepoint's report was "neutralized." While recognizing that IBM's decision to withdraw the job offer was based upon "*both* the initial Choicepoint report and the 1997 order" and its "possibly erroneous interpretation of the legal effect of the 1997 order," App. C10 (emphasis added), the court held that the final result was not caused by the initial false report because it occurred after the supposedly curative provision of the 1997 order.

The court rejected the argument that the inaccuracy was a substantial factor in IBM's decision to withdraw its offer by claiming that, as a matter of law, "plaintiff's injury was caused by only one factor – IBM's conclusion that he had lied on the SDS – and as set forth above, this conclusion did not result from the inaccuracy contained in Choicepoint's initial report." App. C11 n. 5.

First, even assuming, *arguendo*, that the provision of the 1997 order, in combination with the Choicepoint report, gave IBM "accurate" information, *but see infra* Part IV, that does not and cannot establish as a matter of law that Choicepoint's failure to follow procedures and provision of the inaccurate initial report did not cause the resulting withdrawal of the job offer. As a simple matter of but-for causation, there is no question that the adverse information in the report would not have been provided at all had Choicepoint complied with the requirements of the FCRA. Had Choicepoint originally pro-

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[7] Furthermore, had Choicepoint obeyed the requirements of the FCRA it would not have issued its report at all given that it lacked the required certification of use from IBM.

vided the "clean" report that it later provided on reinvestigation, the entire confusion over the petitioner's answers never would have arisen. The notion that there is no causation because Choicepoint *could have* issued a supposedly accurate report listing both the conviction and subsequent vacatur is wholly nonresponsive to the *factual* issue of whether Choicepoint *would have* issued such a report rather than the clean report it *did* issue when it finally conducted an adequate investigation.

On the factual issue of causation, therefore, a jury was fully entitled to conclude, and did conclude, that the initial inaccurate report caused the ensuing events leading to the loss of the job offer regardless of whether the offer might also have been withdrawn under some hypothetical state of facts that never occurred. Had Choicepoint used proper procedures as required by the FCRA, it never would have reported the vacated conviction and petitioner would have received his job and been spared untold mental distress.

Second, the court's conclusion that IBM's decision was based *exclusively* on the supposedly accurate combination of evidence and its acceptance of Choicepoint's claim that the supplemental information broke "the chain of causation between Choicepoint's negligent failure to comply with the FCRA and plaintiff's injury," App. C6, improperly discards the weight a jury was entitled to give to the initial inaccurate report and the lingering effect such inaccuracy could have even after any supposed cure.

IBM was pointed towards a conclusion by the initial report that petitioner was then obliged to overcome. Providing the far-from-self-explanatory court order to human resources personnel unfamiliar with such matters was bound to cause some confusion and proved insufficient to overcome the presumption established by the erroneous report from Choicepoint. What IBM was left with, therefore, was the combination of an inaccurate report and an accurate court order that had a confusing and potentially mixed impact on IBM. In

such circumstances where multiple factors may have influenced a decision-maker, it is not for the court to decide that the impact of the erroneous information was overcome by other factors. The court should have left the causality question with the jury who, in this case, in fact agreed with petitioner that the erroneous report caused his injuries.

The court's decision to remove from the jury the right to determine such mixed-factor causation conflicts with the position of the Third and D.C. Circuits. The Third Circuit, for example, has held that where an erroneous credit report exists but there also are multiple potential causes for the ensuing adverse action, "it is inappropriate to saddle a plaintiff with the burden of proving that one of those factors was the cause of the decision." *Philbin* v. *Trans Union Corp.*, 101 F.3d 957, 969 (CA3 1996). Instead, the Third Circuit leaves the issue to the jury to determine causation.

Indeed, the Third Circuit allows a jury to decide the issue even where the inaccurate credit report was not given as a reason for the adverse action. *Id.* ("a trier of fact could reasonably infer that the inaccurate adverse information included on the inaccurate credit report was an additional, unstated reason for the credit denials"). In this case, by contrast, the court removed the question from the jury despite IBM's express reliance on the inaccurate report as a basis for withdrawing its job offer and despite the admission by Choicepoint that its report "resulted in" petitioner's injury. App. B9, C6, C9. In the Third Circuit, such an express reference to inaccurate information as one reason for a denial of credit is itself evidence from which a jury could infer causation. *Philbin*, 101 F.3d at 968-69. That approach is consistent with the requirement in 15 U.S.C. § 1681b(b)(3)(A) that employers inform applicants when adverse action is taken against them because of credit reports so as to eliminate "the factual issue of whether or not a particular refusal of employment was based *even in part* on adverse information in a credit report." S. Rep. No. 823, 91st Cong., 1st Sess. (1970), at 99 (emphasis

added); *see also id.* at 201 (discussing reason for proposed requirement).

The D.C. Circuit likewise has held that where a decision-maker "'had before [him] a [credit] report" containing adverse information and that such information is generally pertinent to the decision being made, "a trier of fact could reasonably conclude that" the decision-maker took adverse action "at least in part because of the adverse credit report, and summary judgment [is] inappropriate." *Stewart* v. *Credit Bureau, Inc.*, 734 F.2d 47, 54 (CADC 1984). The propriety of leaving causation to a jury in such circumstances is further highlighted where, as in this case, the decision-maker simply *asserts* that the adverse decision was made based upon some separate ground rather than based upon the inaccurate report itself. Even if such assertions are "plausible," a "factfinder could choose not to believe [the decision-maker's] self-serving" assertions. *Id.* The current case fits well within the *Stewart* mold, and the courts below overstepped their authority in taking back from the jury the choice accept a causal chain in which the initial inaccurate report tainted petitioner's employment prospects notwithstanding the district court's own belief that the decision would have been the same without the initial inaccuracy.

The approach to causation applied in the Third and D.C. Circuits is consistent with this Court's holdings regarding multi-factor causation in related contexts. *See, e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 247 (1989) (employment discrimination case declining to allow a defendant having made "an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source" where the decision involved "*both* kinds of considerations") (emphasis added); *Mt. Healthy City School Dist. Bd. of Educe.* v. *Doyle*, 429 U.S. 274, 287 (1977) (once an improper decision-making factor is established, burden shifts to defendant to prove that decision-maker "would have reached the

same decision" even absent the impermissible factor); *cf. Desert Palace, Inc.* v. *Costa*, -- U.S. --, 123 S. Ct. 2148, 2155 (2003) ("direct evidence of discrimination is not required" in order to support "giving a mixed-motive instruction to the jury").

Regardless whether IBM received contrary information from petitioner himself seeking to explain the seeming discrepancy between the credit report and the answer to the questionnaire is wholly beside the point. A jury was entitled to conclude that the initial inaccurate report had so poisoned the well that no subsequent explanation would have satisfied IBM or caused them to maintain their offer. *Cf.* H.R. Rep. No. 16340, 91st Cong., 2d Sess. (1970) at 232-33 ("The risk of harm to an individual from reliance by his creditors and others upon out-of-date public record information cannot be underestimated. * * * [C]lients of the consumer reporting agency are more likely to believe assertions in the agency's report than the consumer's denial[.]"). Trust and confidence lost often is incapable of repair early in a relationship where caution will generally outweigh equity.[8]

Even had the initial report provided more information than IBM sought and listed *both* the conviction and its vacatur, it is doubtful that IBM would have responded with the skepticism and hostility generated by an initial conclusion that plaintiff had lied. JA 1347 (testimony from senior IBM human resources manager that when a person successfully completes a deferred adjudication, it "voids the record so there is no record. * * * If [a defendant] complete[s] [the period of probation] satisfactorily and the court has now ruled

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[8] Indeed, the irretrievable damage done by the initial inaccuracy can be seen in IBM's internal scramble to seek alternative, non-existent, explanations for the withdrawal after receiving additional information. *Supra* at 6. IBM had no intention of changing its entrenched position and, unable to justify its continuing view once its initial reason evaporated, it merely refused to offer any explanation at all.

that [he] completed that satisfactorily, [he] should not have to claim that" he has been convicted on the SDS). In any event, a jury was certainly entitled to conclude as much, and the jury in this case in fact did conclude that the initial false report resulted in injury.

Under the standards employed in the Third and D.C. Circuits, it was a question for the trier of fact to determine whether Choicepoint's initial report was a motivating factor in causing IBM to withdraw the job, or whether the harm of that initial report was fully mitigated by the subsequent disclosure of a confusing court order. The court in this case removed that question from the jury by applying a much more stringent standard of causation that relied exclusively on the last factor in time – the 1997 court order – and ignored any lingering effects on the decision-making process from the initial erroneous report.

This Court thus should grant certiorari in order to protect the proper role of the jury in determining the factual issue of causation in mixed-factor cases and to resolve the conflicting approaches employed by the court below and by the Third and D.C. Circuits.

II. OVERRIDING THE JURY'S DETERMINATION OF CAUSATION DISREGARDED THIS COURT'S HOLDING IN *REEVES* V. *SANDERSON PRODUCTS*.

The decision to override the jury's verdict and finding that petitioner's damages resulted from Choicepoint's violations of the FCRA is especially egregious given that the jury had before it indisputably probative and sufficient evidence of causation in the form of an admission from Choicepoint.

In this case, because it was in keeping with its failed strategy in seeking summary judgment, Choicepoint admitted before trial that "*[a]s a result* of the information provided by Choicepoint, IBM withdrew [plaintiff's] job offer." App. C9 (emphasis added). Without objection from Choicepoint, petitioner elicited this admission (along with others) to the jury at

trial. After reading the admission, the district judge, without objection, instructed the jury that such statements were admissions by Choicepoint under oath.[9] And the court correctly instructed the jury that conduct "is considered to be a proximate cause of an event if the event is the natural and probable result of the conduct." JA 1477.

Given Choicepoint's admission and its near perfect consonance with the correct legal standard of causation, it was no surprise that the jury's special verdict found in favor of petitioner as follows:

> Do you find *as a result* of one or more of Choicepoint's violations of the [FCRA] that plaintiff sustained damages?
>
> Answer: Yes

JA 1479-80 (emphasis added). And that finding, of course, is virtually identical to the FCRA standard that recoverable damages are those sustained "as a result of" the violations of the FCRA. 15 U.S.C. § 1681*o*(a). Indeed, the significance of Choicepoint's admission and the jury's prerogative to base its finding on that admission was all but conceded at oral argument in the Second Circuit. The court below posed the question and received the answer as follows:

> THE COURT: Your adversary makes much of the admission in the 56.1 response, which you admitted that as a result of the information provided by Choicepoint, IBM withdrew the plaintiff's offer. And it does appear that they argued that repeatedly to the jury as proof of causation. And I don't think I saw where you challenged them on that in arguing to the jury. So why couldn't the jury have adopted their argument?
>
> DEFENSE COUNSEL: Your Honor, it is possible that the jury could have.

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[9] A "defendant's admission is, of course, good evidence." *Old Chief* v. *United States*, 519 U.S. 172, 186 (1997).

Oral argument tape, January 24, 2003, counter no.1429.

Despite Choicepoint's admission and the jury's perfectly sound factual finding based on that admission, the courts below reexamined that finding and substituted their own factual inferences regarding the causal chain of events that led to IBM withdrawing its job offer.

By ignoring the jury's factual finding and the self-evident sufficiency of Choicepoint's admission to support that finding, the decision below conflicts with this Court's admonition in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence" on a motion for judgment as a matter of law. As in *Reeves*, the courts here improperly "disregarded critical evidence favorable to petitioner," *id.* at 152 – namely the Choicepoint's admission that its report resulted in IBM withdrawing its job offer. And also as in *Reeves*, the courts below "failed to draw all reasonable inferences in favor of petitioner," *id.* – in particular, the inference that the inaccurate initial report continued to have a lingering adverse effect even after petitioner provided IBM the 1997 order vacating his conviction, and that the initial report contributed to IBM's confusion over the significance of that order.

In rejecting the jury's obvious acceptance of Choicepoint's admission, and the numerous possible inferences regarding how the initial inaccurate report altered IBM's decision-making process even assuming the supplemental information corrected the initial error, "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 153. Indeed, it blinks reality that any court following precedent would ignore the evidentiary import of a party admission whose language, literally construed, supported the verdict in its entirety.

III. THE DECISION BELOW ERRED IN HOLDING THAT DAMAGES FOR MENTAL DISTRESS AND PUNITIVE DAMAGES ARE DEPENDENT ON CAUSATION FOR ECONOMIC DAMAGES, CONTRARY TO THE HOLDINGS IN OTHER CIRCUITS.

The decision below dismissed not only petitioner's claims for economic injury from lost wages but also his claims for compensatory damages for mental distress and punitive damages based on Choicepoint's flagrant disregard of petitioner's rights. The court of appeals addressed all of petitioner's claims as one and drew no distinction between the causation requirements for those other forms of damages.

A. Damages for Mental Distress.

In addition to the loss of his job offer, petitioner in this case claimed damages for mental distress from the issuance of the inaccurate report. The decisions below, however, found no causation for damages and dismissed the complaint in its entirety based solely on the supposed lack of causation between the report and IBM's withdrawal of its job offer. Even assuming a lack of causation for economic injury, that should not have been carried over to dispose of the actual damages for mental distress.

In other circuits, compensatory damages for intangible injuries such as mental and emotional distress, humiliation, and loss of reputation do not require additional proof of any substantive adverse reaction based upon the inaccurate report. Rather, the fact that the report was issued to an employer and caused petitioner embarrassment and distress while attempting to correct the error of the report is sufficient to support an award of actual damages. *See Guimond* v. *Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (CA9 1995) (denial of credit not necessary to make out a prima facie case for damages; inaccuracies alone are sufficient to justify an award of damages for the embarrassment stemming therefrom); *Stevenson* v. *TRW*, 987 F.2d 288, 296 (CA5 1993) ("Actual

damages include humiliation or mental distress, even if the consumer has suffered no out-of-pocket losses."); *Dalton* v. *Capital Associated Industries, Inc.*, 257 F.3d 409, 418 (CA4 2001) ("Even though [the] false report is not what prevented [plaintiff] from getting a job * * *, [Plaintiff] need only show that he suffered damages from the false report, regardless of how Sumitomo reacted to the report. Specifically, Dalton alleges that he suffered emotional distress and loss of reputation as a result of the false report. Damages for such injuries are recoverable under FCRA.") (citing *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 369 n. 15 (CA5), *cert. denied*, 534 U.S. 951 (2001); *Bakker* v. *McKinnon*, 152 F.3d 1007, 1013 (CA8 1998); *Guimond*, 45 F.3d at 1333; *Zamora* v. *Valley Fed. Savs. & Loan Ass'n*, 811 F.2d 1368, 1371 (CA10 1987)).

In the present case, petitioner presented substantial evidence of emotional distress arising directly from the false report. That he thereafter desperately sought to explain the false report hardly *cured* the embarrassment and distress caused by the report. Rather, those efforts to mitigate the damage are all evidence of the obvious distress petitioner experienced and the great efforts he exerted in response to such stress. Thus, even assuming plaintiff could not prove economic loss, the Second Circuit erroneously dismissed his additional claims for compensatory damages for mental distress. Such damages would not only have compensated him for at least some of the injury he suffered, they would also have supported attorney's fees and costs.

B. Punitive Damages.

A credit reporting agency is liable for punitive damages where its violations of the Act are willful. 15 U.S.C. § 1681n. The circuits agree that willfulness exists where the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights of others,' but" does not depend on a showing of "'malice or evil motive.'" *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 226 (CA3 1997) (*citing Philbin* v. *Trans Union Corp.*, 101 F.3d 957, 970 (CA3 1996); *Pinner* v.

Schmidt, 805 F.2d 1258, 1263 (CA5 1986), *cert. denied,* 483 U.S. 1022 (1987)); *accord Thornton* v. *Equifax, Inc.,* 619 F.2d 700, 705 (CA8), *cert. denied,* 449 U.S. 835 (1980).

Where such disregard for the requirements of the FCRA is demonstrated, both the Fourth and Eighth Circuits allow recovery of punitive damages regardless of whether there are other actual damages. *See, e.g., Bakker* v. *McKinnon,* 152 F.3d at 1013 (CA8) ("'Actual damages are not a statutory prerequisite to an award of punitive damages under the [FCRA].'") (quoting *Yohay* v. *City of Alexandria Employees Credit Union, Inc.,* 827 F.2d 967, 972 (CA4 1987); *Millstone* v. *O'Hanlon Reports, Inc.,* 528 F.2d 829, 834-35 (CA8 1976) (per Associate Justice Tom C. Clark, sitting by designation) (upholding recovery of damages for "mere mental pain and anxiety," and upholding award of punitive damages).

The Second Circuit in this case, by contrast, refused to reach the issue of punitive damages solely because it affirmed the judgment as to causation of actual damages. But one should have nothing to do with the other, and the Second Circuit's holding to the contrary is in conflict with the holdings of the Fourth and Eight Circuits. This Court therefore should grant certiorari to resolve this circuit split.

IV. THE LEGAL STANDARD FOR WHETHER A REPORT HAS THE "MAXIMUM POSSIBLE ACCURACY" IS AN IMPORTANT NATIONAL QUESTION ON WHICH THE CIRCUITS ARE DIVIDED.

A final issue warranting this Court's attention is the erroneous and destructive interpretation what constitutes "accurate" information under the FCRA. By holding that petitioner's provision of the 1997 order to IBM "neutralized" the inaccuracy of the initial credit report and that the resulting combination of information was accurate, the courts below adopted a distorted notion of accuracy and effectively immunized Choicepoint from liability for its unequivocal violations of the FCRA. Allowing FCRA violations to be fully immu-

nized by the efforts of the victim to mitigate the damage caused by an inaccurate report would gut both the remedial and deterrent purposes of the Act.

Consistent with the FCRA's concern for privacy, and its express distinction between an "accurate" report and a "complete and up to date" report, an accurate report must contain not only technically true information, but must be limited to only such information as was requested by the company or allowed by law, and must not be misleading. Accuracy thus involves reporting what is asked for by an employer; no more, no less. Additional information that is true in the abstract nonetheless constitutes an inaccurate answer to a question not calling for such information.

In this case, the courts below held that the sole error in Choicepoint's initial report was its *omission* of the subsequent order vacating the plea and dismissing the charges. From that incorrect premise, the courts concluded that the ultimate combination of the inaccurate report of conviction and the subsequent vacatur order constituted accurate information "[r]egardless of whether the 1997 Order legally expunged the 1995 conviction." App. C8. That reasoning is in error for several reasons.

First, because IBM did not request, and therefore Choicepoint's procedures directed it not to provide, information about vacated convictions, Choicepoint's initial report was not an accurate response to IBM's request for a report regardless of whether it would have been technically true for Choicepoint to have reported *both* the conviction and the vacatur. Indeed, as the courts below recognized, "when confronted with the 1997 dismissal order, as well as plaintiff's assertions about the legal effect of the order, Choicepoint concluded that plaintiff's conviction had been legally expunged" and subsequently issued a "clear" report. App. C10-11 n. 4.

While the courts below asserted that the subsequent report "does not alter the complete and accurate nature of the infor-

mation relied on by IBM in reaching its own conclusions," *id.*, that claim conflates completeness and accuracy and hence renders meaningless the different terms employed in the statute. Choicepoint's own behavior regarding the second report was sufficient evidence of its understanding of the request made of it by IBM and the nature of an "accurate" response to that request. Had Choicepoint followed the procedures mandated by the FCRA, a clear report would have been the "accurate" response to IBM's request. A report containing extraneous information regarding petitioner's vacated conviction, even as supplemented by the 1997 vacatur, was and remained an inaccurate response to IBM's request for information.

Second, the fact that the legal significance of the dismissal order might be less than clear and hence could lead to varied conclusions regarding petitioner's conviction, App. C8, only shows how reporting both the conviction and the 1997 Order is misleading even if *technically* accurate. The D.C. Circuit has recognized that "reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the reports" and hence may give rise to liability for damages. *Koropoulos,* 734 F.2d at 40. And the Sixth Circuit has recognized that the burden of evaluating such information rests with the credit reporting agency, and cannot be dumped in the lap of the recipient of the report at the expense of the consumer or potential employee. *See Bryant* v. *TRW,* 689 F.2d 72, 78 (CA6 1982) (affirming finding that, in enacting the FCRA, Congress has not intended consumer reporting agencies to act merely as conduits of information, but to be responsible for evaluating the correctness of the information they impart). The suggestion by the courts below, App. C9, that reporting agencies cannot be held liable for "their customer's inaccurate interpretations" of misleading raw data given in a report thus conflicts both with the underlying purposes of the FCRA and the interpretations of that Act by other circuits.

In this case, Choicepoint would not have provided and IBM would not have expected information about the vacated conviction. Even had Choicepoint itself provided information on both the conviction and the vacatur, therefore, such information would not have been an "accurate" response to IBM's query of it. Giving *more* information than requested, even if true, is an inaccurate and misleading response to the request.[10]

Third, in addition to being an inaccurate response *to the request* for information made by IBM, the disclosure of both the conviction and vacatur also is an inaccurate legal response. As the D.C. Circuit has recognized in the context of the Youth Corrections Act, 18 U.S.C. §§ 5005, 5021 (repealed 1984),

> unless the * * * ex-offender whose conviction was set aside may legally deny the existence of that previous conviction, he will almost inevitably and forever bear its stigma in terms of both social relationships and economic opportunities. Anything less leaves him at best only slightly better off than if his conviction had never been "set aside" at all.

Doe v. *Webster*, 606 F.2d at 1239-40.

The courts below explicitly parted company with the D.C. Circuit's *Webster* opinion. While recognizing that the statute under which plaintiff's conviction was vacated appears to allow the ex-offender to deny the existence of the conviction to a private employer, App. B20, it relieved a credit reporting company of making any such determination in favor of simply providing raw data to a prospective employer regardless of how confusing or misleading such data might be.

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[10] Indeed, the very fact that IBM did not want information about expunged convictions, rather than requesting all information about such convictions, suggests that it recognizes that there is a negative to giving its human resources managers such information.

The suggestion that it would be "'judicially mandated prevarication,'" App. C8 (quoting *United States* v. *Doe*, 36 F. Supp.2d 143, 144 (S.D.N.Y. 1999)), to hold a reporting agency responsible for providing *only* the information sought by the employer and require it to exclude extraneous and misleading information that was not requested is a distortion of the statute and of the salutary purposes of the Act and of informational privacy in general. Denying the existence of a vacated conviction is not a lie; it is a true description of affairs and the very point of having the conviction vacated in the first place.

Fourth, at a minimum, the issue of accuracy should have been left to a jury. There was no dispute that Choicepoint's initial report was inaccurate, and the courts below took it upon themselves to conclude that petitioner's supplemental information "neutralized" that inaccuracy. But if even the supposedly neutralized information was a potentially inaccurate response under the agreement between Choicepoint and IBM, or was potentially misleading despite its supposed technical accuracy, the question should have gone to a jury to decide whether the report was inconsistent with the Choicepoint-IBM agreement or whether it remained misleading. Such an approach to determining accuracy has been applied in both the Tenth and D.C. Circuits. *See, e.g.*, *Cassara* v. *DAC Services, Inc.*, 276 F.3d 1210, 1218, 1225 (CA10 2002) (even where the "events *as events* are not in dispute," where there is a "dispute concern[ing] the manner in which these events have been characterized – whether each event has been placed in the proper *category*" – it raises a jury question "whether the reporting was in fact accurate in light of whatever definitions or criteria *do* apply" for categorization purposes and thus whether a disputed categorization of particular events is "in fact 'accurate' within the meaning of the Fair Credit Reporting Act") (emphasis in original); *Koropoulos*, 734 F.2d at 39 (whether a credit report is maximally accurate

or merely technically accurate but misleading is a question for the trier of fact).

The conflation of "accuracy" with technical completeness in the decisions below severely undermines the purposes of the FCRA and those laws allowing convictions to be vacated. Granting a writ of certiorari is necessary to preserve the effectiveness of the Act and to reconcile the conflicting approaches among the circuits in determining "accuracy."

V. THIS CASE RAISES IMPORTANT AND RECURRING NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

The questions presented by this petition are of national importance both because of the frequency of their occurrence in litigation under the FCRA and because they involve important questions regarding personal privacy and the rehabilitative purposes of laws that expunge convictions. The issues of accuracy and causation can be expected to arise in the vast majority of cases alleging inadequate procedures to ensure accuracy under the FCRA because victims of inaccurate reports will invariably take steps to dispute any inaccuracies once they are discovered. Indeed, plaintiffs are effectively required to take such steps or subject themselves to a defense that they failed to mitigate their damages. But if such steps attempting mitigation – *i.e.*, providing potential employers with supplemental information disputing the erroneous report – are deemed to render the initial report accurate in combination and hence to break the causal chain to damages, credit reporting agencies will rarely, if ever, be liable for even the most egregious violations of the Act. No case in which a plaintiff acted responsibly would be free from such a defense and hence the requirements of the FCRA would become toothless and litigation to enforce the FCRA impractical.

The questions presented herein are also important as a result of their interaction with various federal and state laws regarding the treatment of vacated or expunged convictions.

Such laws are designed to facilitate the rehabilitation and protect the privacy of offenders who have successfully taken the required steps to clear their record. It is a cruel and counterproductive hoax to allow such individuals lawfully to deny the existence of expunged convictions yet to immunize the reporting of those convictions as an "accurate" description of a person's record. As one witness who testified during Senate Hearings noted, reporting criminal proceedings that were ultimately dismissed can have a severe and adverse impact on the accused:

> The fact that a person has been arrested will often operate to deny him * * * employment * * * [and] goes against a feeling in our society that individuals should have an opportunity to remake their lives and their careers without this being something that so dominates them later on that they can never really reform themselves. * * * As such, the credit reporting system displays serious flaws in obtaining and recording information about arrests that lead to dismissed charges[.]

S. Rep. No. 823, 91st Cong., 1st Sess. (1970), at 81, 93.

Finally, in the last several years, in part due to the development of the Internet, the public has become more concerned about personal privacy. *See, e.g.*, Electronic Privacy Information Center web site, http://www.epic.org (visited July 24, 2003) (addressing numerous issues involving privacy in the electronic age). It should come as no surprise then that more and more FCRA suits are being brought. In an electronic age where records can persist even after they have technically been vacated, the only way to give effect to statutes encouraging rehabilitation and protecting privacy is to place the onus of "maximum accuracy" on the reporting agencies themselves.

The decision below, if allowed to stand, will have far-reaching effects on consumers seeking damages under the FCRA. If this plaintiff, with substantial evidence of causa-

tion, three violations of the FCRA, and a jury verdict in his favor cannot obtain a single dollar of damages under the FCRA, then it is hard to imagine who can.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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